

Message Text

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SUBJECT: PAPER ON TREATY TRADER/TREATY INVESTOR VISAS FOR LONDON
CONSULAR CONFERENCE

REF: STATE 083603, FRANKFURT 2127 AND 2307

FOLLOWING IS FRANKFURT PAPER ON PROBLEMS RELATING TO TREATY TRADER/
TREATY INVESTOR VISAS, WHICH DEPARTMENT MAY FIND OF USE AT LONDON
CONSULAR CONFERENCE:

BEGIN TEXT

1. WITH THE EXCEPTION OF CERTAIN LAWS AND REGULATIONS THAT ARE
NECESSARY TO PROTECT NATIONAL SECURITY OR OTHER ESSENTIAL INTERESTS,
U.S. POLICY FAVORS THE REMOVAL OF LEGAL OR ADMINISTRATIVE
IMPEDIMENTS TO FREEDOM OF INTERNATIONAL INVESTMENT CAPITAL TO
FLOW TO MOST PRODUCTIVE USES. U.S. REGULATIONS ON THE ISSUANCE
OF TREATY TRADER/TREATY INVESTOR VISAS, HOWEVER, DEPART FROM
THIS GUIDELINE AND MAY CONTRIBUTE TO IMPEDING OF FOREIGN DIRECT
INVESTMENT IN THE UNITED STATES.

2. THE PRINCIPLE OF RECIPROCITY UNDERPINS THE TREATY
RELATIONSHIP THAT PERMITS THE ISSUANCE OF TREATY TRADER/TREATY
INVESTOR VISAS. U.S. DIRECT INVESTMENT ABROAD IS ROUGHLY FIVE
TIMES THE LEVEL OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES;
MOREOVER, IT IS CONCENTRATED IN THOSE INDUSTRIALIZED COUNTRIES
WHICH ARE THE HEAVIEST DIRECT INVESTORS IN THE UNITED STATES.

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IF THE UNITED STATES SHOULD FOLLOW A RESTRICTIVE VISA POLICY

AGAINST THE EMPLOYEES OF FOREIGN CORPORATIONS, AND FOREIGN OFFICIALS SHOULD ADOPT A MORE RESTRICTIVE POLICY ON RESIDENCE AND WORK PERMITS FOR OFFICERS AND EMPLOYEES OF U.S. FIRMS, WE RUN THE RISK OF LOSING SUBSTANTIALLY.

3. TREATY TRADER/TREATY INVESTOR VISAS (E-1 AND E-2) ARE REQUIRED TO FACILITATE FOREIGN ENTERPRISES WITH HEAD OFFICES IN COUNTRIES WITH WHOM WE HAVE THIS TREATY RELATIONSHIP TO ASSIGN EXECUTIVES, SUPERVISORS AND SPECIALISTS TO THE UNITED STATES FOR EXTENDED OR PROLONGED PERIODS SHORT OF PERMANENT RESIDENCE. THE SPECIAL REQUIREMENTS COVERING THIS VISA CATEGORY ARE STRICT. (A) THE FOREIGN FIRM IN THE UNITED STATES MUST BE OF THE SAME "NATIONALITY" AS THE TREATY COUNTRY (SECTION 101(A)(15)(E) OF INA). THE TERM "NATIONALITY IS NOT DEFINED IN THE ACT, AND IS TREATED IN THE IMPLEMENTING REGULATIONS IN TERMS OF MAJORITY CONTROL (THAT IS, MORE THAN 50 PERCENT) OF CAPITAL BY A PERSON OR PERSONS WHO ARE NATIONALS OF THE TREATY COUNTRY (22 CFR 41.40 AND 41.41). (B) THE APPLICANT FOR A TREATY TRADER/TREATY INVESTOR MUST HAVE THE SAME NATIONALITY AS THE EMPLOYING FOREIGN FIRM (SECTION 10(A)(15)(E) OF INA). THUS, A GERMAN FIRM IN THE UNITED STATES CAN BRING ONLY GERMAN EMPLOYEES TO THE UNITED STATES UNDER THE TREATY TRADER/TREATY INVESTOR VISA PROVISIONS. (C) EXPORTS AND IMPORTS OF GOODS AND SERVICES OF THE FIRM IN THE UNITED STATES MUST INVOLVE INTERNATIONAL INTERCOURSE OF MORE THAN 50 PERCENT BETWEEN THE UNITED STATES AND THE TREATY COUNTRY OF WHICH THE FIRM IS A NATIONAL.

4. IN CERTAIN RESPECTS, THESE PROVISIONS MAY NOT BE APPROPRIATE FOR MULTINATIONAL CORPORATIONS TODAY. MULTINATIONAL CORPORATIONS MAY OWN FOREIGN SUBSIDIARIES WHICH, ALTHOUGH INDEPENDENT ENTITIES, TO ALL EFFECTS AND PURPOSES ARE INTEGRAL COMPONENTS OF ONE GROUP. THE U.S. SUBSIDIARY OF FOREIGN CORPORATIONS MAY ENGAGE SIGNIFICANTLY IN TRADE OTHER THAN BILATERALLY BETWEEN THE UNITED STATES AND THE HOST COUNTRY. THE OFFICERS OF MULTINATIONAL CORPORATIONS WILL HAVE VARIOUS NATIONALITIES AND BE TRANSFERRED BETWEEN THE OVERSEAS PARTS OF THE PARENT FIRM PRIMARILY ON THE BASIS OF THEIR INDIVIDUAL QUALIFICATIONS AND BACKGROUND.

5. THE ABOVE DIFFICULTIES PARTICULARLY ARISE IN
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THE CASE OF US-BASED, FOREIGN-OWNED CONSORTIA BANKS AND FINANCIAL INSTITUTIONS. SUCH INSTITUTIONS ENGAGE IN SPECIFIC ACTIVITIES TAILORED TO THE REQUIREMENTS OF THE US MARKET AND TYPICALLY DO NOT MAINTAIN FOREIGN BRANCHES OR SUBSIDIARIES OF THEIR OWN. TYPICALLY ONE PARTICIPANT IN A CONSORTIUM WILL OWN MORE THAN 50 PERCENT OF THE OUTSTANDING SHARES, THUS MAKING IT DIFFICULT TO ASSIGN A "NATIONALITY" TO THE US-BASED FIRM. SEVERAL MINORITY PARTICIPANTS IN THE CONSORTIUM MAY HAVE

COME FROM ONE COUNTRY AND JOINTLY OWN A SHARE PARTICIPATION HIGHER THAN THE MAJORITY PARTICIPANT, THUS GIVING, UNDER US VISA REGULATIONS, A FALSE OR MISLEADING "NATIONALITY" TO THE US-BASED FIRM. AS A CONSEQUENCE OF THE INABILITY TO ASSIGN A "NATIONALITY" TO THE US-BASED FIRM, THE TEST OF TRADE IN GOODS AND SERVICES AMOUNTING TO MORE THAN 50 PERCENT OF TOTAL BUSINESS BETWEEN THE UNITED STATES AND THE TREATY COUNTRY CANNOT BE MET, NOR CAN THE QUESTION OF NATIONALITY OF THE OFFICERS OR EMPLOYEES OF THE FIRM TO BE ELIGIBLE FOR TREATY TRADER/TREATY INVESTOR VISAS BE ANSWERED.

6. RECOMMENDATIONS:

A STRICT READING OF VISA REGULATIONS REVEALS AMBIGUITY REGARDING THE TYPE OF VISA TO BE ISSUED TO OFFICERS OR EMPLOYEES OF FOREIGN BANKS AND FINANCIAL INSTITUTIONS BEING TRANSFERRED TO A US-BASED CONSORTIUM INSTITUTION. EITHER OF TWO ALTERNATIVES SEEMS OPEN.

(1) THE CONCEPT OF "INTRA-COMPANY TRANSFEREE" MIGHT BE REDEFINED TO PERMIT THE ISSUANCE OF L-1 VISAS TO EMPLOYEES OF INTERNATIONAL FIRMS WHO ARE BEING TRANSFERRED TO FIRMS IN THE UNITED STATES WITH WHICH THEY HAVE A SUBSIDIARY OR AFFILIATE RELATIONSHIP.

(2) ALTERNATIVELY, REGULATIONS ON THE ISSUANCE OF TREATY TRADER/ TREATY INVESTOR VISAS MIGHT BE AMENDED TO REMOVE THE "NATIONALITY" REQUIREMENT.

(3) IN LOOKING TO A TREATY TRADER/TREATY INVESTOR RELATIONSHIP WHERE THE US FIRM IS A CONSORTIUM, JOINTLY OWNED BY SEVERAL INVESTORS IN MORE THAN ONE COUNTRY, THE 50-PERCENT RULE SHOULD BE BASED ON THE TOTALITY OF FOREIGN INVESTMENT, AND ISSUANCE OF TREATY TRADER/TREATY INVESTOR VISAS BE AUTHORIZED TO NATIONALS OF THOSE COUNTRIES WITH WHICH THE UNITED STATES HAS A TREATY RELATIONSHIP.

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(4) THE OWNERSHIP REQUIREMENT UNDER TREATY TRADER/TREATY INVESTOR VISA REGULATIONS MIGHT BE REDUCED FROM 50 PERCENT TO 10 PERCENT TO ACCORD WITH THE CURRENT US GOVERNMENT DEFINITION OF FOREIGN DIRECT INVESTMENT IN CASES OF MIXED US-FOREIGN OWNERSHIP WHEN THE FOREIGN INVESTOR IS THE DOMINANT INVESTOR IN A WIDELY-HELD PUBLIC CORPORATION.
END TEXT.LEHMANN

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